

February 12, 1996

DOCKET NO. E-002/M-95-54

ORDER DENYING MOTION WITHOUT PREJUDICE

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Joel Jacobs
Tom Burton
Marshall Johnson
Dee Knaak
Don Storm

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Petition of Northern States
Power Company for Approval of a Request for
Proposal for Approximately 50 MW of
Biomass Generation

ISSUE DATE: February 12, 1996

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PROCEDURAL HISTORY

In 1994, the Minnesota legislature passed Minn. Stat. § 216B.2424 (1994). This statute requires Northern States Power Company (NSP or the Company) to construct and operate, or purchase, 50 MW of installed capacity generated by farm grown, closed-loop biomass by December 31, 1998.

On August 18, 1994, the Commission issued its ORDER ACCEPTING COMPANY'S PROPOSAL WITH MODIFICATIONS AND REQUIRING FURTHER FILINGS in Docket No. E-002/RP-93-630; E-002/CI-93-6. In that Order the Commission approved most aspects of a supply-side bidding program proposed by NSP. The bidding program would be used to select the Company's new capacity.

On April 24, 1995, the Commission issued its ORDER APPROVING PROPOSAL WITH MODIFICATIONS in the above-captioned docket. In that Order the Commission approved NSP's proposed biomass Request for Proposal (RFP), with certain modifications. At p. 8 of the Order, the Commission required NSP to explain in its RFP "...that the term 'farm grown, closed-loop biomass' does not at this time have a clear definition under statute or rule."

On September 29, 1995, the Commission received NSP's short list of bidders, one of which is Norstar, LLC (Norstar), a joint venture between NSP's wholly-owned subsidiary, NRG, and Lindroc Energy.

On November 29, 1995, Norstar filed a motion with the Commission. Norstar asked the Commission to intervene immediately into the RFP process, to modify its prior Order to clarify the fuel requirement, and to direct NSP to allow all bidders to modify their proposals accordingly.

On December 20, 1995, comments were filed by the Department of Public Service (the Department), the Residential Utilities Division of the Office of Attorney General (RUD-OAG), Minnesota Valley Alfalfa Producers (MnVAP), and Minnesotans for an Energy Efficient Economy (ME3).

On December 21, 1995, NSP filed reply comments.

On January 11, 1996, Norstar filed reply comments.

On January 19, 1996, NSP filed a letter with the Commission, in which NSP stated that it intends to delay its decision on the winning bid proposal for at least 30 days.

On February 1, 1996, the matter came before the Commission for consideration.

FINDINGS AND CONCLUSIONS

I. POSITIONS OF THE PARTIES

A. Norstar

According to Norstar, NSP went beyond the explanation of “no clear definition” as required in the April 24, 1995, Order, and instead provided the following interpretation of the phrase “closed-loop, farm grown biomass:”

NSP interprets the phrase “closed-loop” to mean that the carbon dioxide released by combustion of the biomass fuel is less than or equal to the amount of carbon dioxide absorbed by the biomass fuel during its growing cycle. “Biomass” is interpreted to be any organic matter meeting the definition set forth in Minnesota Statute, Section 216C.051, subd. 7(g)(1) (1994). NSP’s interpretation of “farm-grown” includes any biomass which is cultivated, in whole or in part, for use as fuel for the generation of electricity.

Norstar stated that NSP further restricted the definitions of the fuel terms in a letter dated November 13, 1995, in which NSP added the following elements: the product must be a new, dedicated biomass fuel source; the biomass would not exist but for its intended use as a fuel.

Norstar’s proposal had originally contemplated the burning of wood “slash” (unused portions of trees whose trunks are used for pulp production) together with agricultural waste from Minnesota corn and soybean crops. Norstar claimed that NSP’s increasingly restrictive definitions of the fuel terms marked a change in mid-stream of the bidding procedure, resulting in Norstar’s amending its proposal to a higher cost fuel mix.

Norstar argued that NSP’s definitions were contrary to the canons of statutory construction, particularly the rule giving preference to the plain meaning of words. Norstar agreed with the RUD-OAG’s recommended definitions.

Norstar also argued that NSP applied its changing definition inconsistently, resulting in the

continued viability of certain alfalfa-based fuel proposals while Norstar's proposal was forced outside the bidding parameters.

Norstar asked the Commission to intervene immediately into the RFP process, to modify its April 24, 1995 Order to assign a broader definition to the fuel requirement provision, and to direct NSP to allow all bidders to modify their proposals accordingly.

B. MnVAP

MnVAP, an association of alfalfa producers, asked the Commission to deny Norstar's motion and to direct the RFP procedure to proceed.

MnVAP stated that NSP should not be allowed to modify the bidding procedure in response to its affiliate's request.

C. The Department

The Department recommended that the Commission deny Norstar's motion. While the Department agreed with Norstar that NSP had narrowed the definition of the term "farm grown closed-loop biomass" since the approval of the RFP, all parties had received the narrower definition simultaneously, in time to prepare their bids. Changing the definitions at this point in the bidding process could risk the integrity of the bidding process.

The Department stated that NSP's use of rather conservative, narrow definitions is an appropriate risk allocation: NSP cannot risk a broader definition which could render the bidding process vulnerable to appeal and delay compliance with the biomass mandate. The Department believed that NSP's proposed definitions are reasonable and fulfill the canons of statutory construction.

D. The RUD-OAG

The RUD-OAG stated that Norstar's request for broader definitions of the term "farm grown closed-loop biomass" is not unreasonable under the canons of statutory construction. On the other hand, the RUD-OAG did not believe that NSP's definitions are unreasonable or inconsistent with the statute.

According to the RUD-OAG, the Commission should require NSP to reopen bidding from the beginning, allowing parties to submit proposals under a broader definition of "farm grown closed-loop biomass." This would allow the highest possible level of competition under the bidding procedure.

The RUD-OAG proposed the following fuel definition: "Biomass which is cultivated on a farm, and which releases no more carbon into the atmosphere through combustion than is absorbed from the atmosphere by the biomass while it is growing."

E. ME3

ME3 recommended that the Commission deny Norstar's motion for clarification of the fuel

definition. The original legislation was meant to encourage markets and technologies for Minnesota energy crops; NSP's definition, which fulfills this intent, should stand.

F. NSP

NSP opposed Norstar's motion for clarification and for Commission intervention in the bidding process.

NSP argued that the timing of Norstar's motion was inappropriate. According to NSP, the Commission is not the manager of the bidding process, but is rather the architect and monitor of a fair bidding procedure. Under the approved bidding process, the Commission only reviews the bidding procedure at certain times. Bidders should not be allowed to appeal each decision of NSP in the process; Norstar will have the opportunity to challenge the procedure in the post-selection investigation period. If Norstar's motion were granted, and fundamental bidding premises were changed thereby, it would be necessary to start the bidding procedure over.

NSP argued that it was necessary to fully define the phrase "farm grown, closed-loop biomass" to give potential bidders notice of the bidding parameters and to reduce the risk of the bidding process eventually being overturned upon appeal. NSP stated that its statutory interpretation of the fuel definition is reasonable. NSP looked at the full range of possible reasonable definitions and chose definitions on the conservative end of the range, in order to reduce the risk of noncompliance with the biomass mandate. NSP stated that all potential bidders were fully apprised of NSP's definition of "farm grown closed-loop biomass" in pre-bid clarifications, before bids were submitted.

According to NSP, the task is not to determine the correct definition among a number of reasonable possibilities, but rather to determine the correct allocation of risk.

In its January 19, 1995, letter to the Commission, NSP gave three reasons that it intends to delay its decision on the winning bid proposal for at least 30 days. First, if Norstar's motion for clarification of the RFP is granted, it may be necessary for NSP to amend the current bidding process. Second, NSP has become aware of legislation pending in the Minnesota legislature which may change the statutory fuel definition and otherwise affect existing bids. Finally, NSP stated that there are aspects of the short-listed proposals, most notably their price, which warrant more deliberative analysis.

II. COMMISSION ACTION

The Commission's August 18, 1994, Order establishing a procedure for NSP's supply-side bidding program was the culmination of extensive negotiation among interested parties and careful review by the Department and the Commission. The Order established a detailed bidding procedure for NSP's procurement of new capacity.

Among other things, the August 18 Order set the parameters of Commission review and oversight during the phases of a bidding procedure. The Commission reviews the Company's initial contract with the evaluator; the Company and the evaluator submit their filings with the Commission; the Commission has the opportunity to initiate an investigation at two different phases of the process; and the Commission reviews and approves the final contract. The

approved procedure provides that NSP will have the right and responsibility to conduct and facilitate all other phases of the bidding process.

The established bidding procedure guides the Commission's consideration of Norstar's motion for clarification in two ways. First, the Commission is reluctant to take one issue (the definition of farm grown closed-loop biomass) out of context in the bidding process, most of which the Commission is rightly leaving to the Company to conduct, and interject a decision at this time. This does not mean that the Commission would not intervene if it became aware of clear impropriety in the bidding procedure. In this case, however, the failure of parties to agree on a proper definition seems to come within the parameters of the normal multi-step bidding procedure. The Commission finds that imposing a definition at this juncture, outside of the normal opportunities for its review and oversight, could unnecessarily distort the bidding process.

The established structure of the bidding procedure helps determine the Commission's treatment of Norstar's motion in a second way. If it ultimately proves necessary for the Commission to determine a fuel definition for the parties, it would be better for the Commission to avoid the current phase of the program, in which the bidders are moving to the final selection process. If the Company decides to start the bid process over and reopen it for all bidders, as it has indicated it most likely will do, the Commission might respond to a request for definition clarification at the point of bid reopening. Another possibility for clarifying the term "closed-loop farm grown biomass" would be the opening of bidding for the next phase of biomass generation required under the statute.

Refraining from clarifying the fuel definition at this point would also give all parties the opportunity to consider the fate of the currently pending legislation and the Company's report at the close of its 30 day period.

For these reasons, the Commission will deny Norstar's motion for clarification of the fuel definition. Because the Commission recognizes a possibility that clarification may be appropriate at another time, the Commission will deny the motion without prejudice to Norstar's ability to renew the motion in the future.

ORDER

1. The Commission denies Norstar's motion for clarification of the fuel definition without prejudice.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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